No. 89-1760

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

IMMUNO A.G.,

Petitioner,

vs.

J. MOOR-JANKOWSKI,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in a case involving a state law libel cause of action, this Court should review the findings of fact of the state courts?

2. Whether this Court should review the state courts' application of their ordinary rules for summary judgment?

3. Whether it is permissible to consider that the statements at issue were contained in a letter to the editor as one factor in deciding whether they constituted opinion?

4. Whether this Court should review a decision of the highest court of a state when the decision was based independently on state constitutional grounds?

PARTIES TO THE PROCEEDING

Petitioner Immuno A.G. is a commercial corporation organized and existing under the laws of Austria, having its principal office in Vienna, Austria, and having affiliated companies in approximately 30 different countries. Immuno A.G. manufactures biologic products from human blood plasma. (Pet. App. 32)[1]

Respondent Dr. Jan Moor-Jankowski is a "universally acknowledged authority on the use of primates in biomedical research" (Pet. App. 32-33), a professor of medical research at the New York University Medical School, the Director of the New York University Medical School's Laboratory for Experimental Medicine and Surgery in Primates ("LEMSIP"), the Director of the World Health Organization Collaborating Center for Hematology of Primate Animals and editor-in-chief of the *Journal of Medical Primatology*. (Pet. App. 33) Dr. Moor-Jankowski testified that the *Journal of Medical Primatology* reports on the use of primate animals in biomedical experimentation.

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[1] Citations to petitioner's appendix will have the abbreviation "Pet. App.".

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, Section 28 of Article I of the New York State Constitution, and Section 3212 of the New York Civil Practice Law and Rules ("CPLR") are set forth in pertinent part in Respondent's Appendix. (Resp. App. 1)

STATEMENT OF THE CASE

The facts are stated in the opinion of the New York Appellate Division. (Pet. App. 32-38, 50-54, 59-61) The case involves the decision by Dr. Moor Jankowski to print in the *Journal of Medical Primatology* a letter to the editor by Shirley McGreal. (Pet. App. 97-101) Before printing the letter, Dr. Moor-Jankowski reviewed documents from Immuno A.G.'s files and articles from the respected Austrian newspaper *Die Presse* confirming the contents of the letter and twice wrote Immuno A.G. to comment and reply to the views expressed in the letter. Immuno A.G. refused, instead stating through counsel that the views in the letter were "wholly inaccurate and reckless" and threatening legal action if the letter were printed. Along with the letter, Dr. Moor-Jankowski published an Editorial Note in which he included the statements made by counsel for Immuno A.G.

On December 14, 1984, Immuno A.G. served its complaint alleging libel and *prima facie* tort against Dr. Moor-Jankowski (and others no longer in this case). Extensive discovery was conducted over a period of two years, including fourteen days of deposition of Dr. Moor-Jankowski. On September 5, 1986, Dr. Moor-Jankowski moved for summary judgment. The motion court denied the motion as to libel but granted it as to *prima facie* tort. (Pet. App. 15-30)

The Appellate Division-First Department, after a thorough review of the record, reversed and granted summary judgment dismissing the complaint. (Pet. App. 31-70)

The Appellate Division decision reflects three fundamental legal principles. First, the importance of the constitutional protection of opinion and the resulting importance of distinguishing opinion from fact. (Pet. App. 40-42) Second, the requirement that a libel plaintiff opposing a motion for summary judgment come forward with proof in evidentiary form sufficient to generate a triable issue as to the offending statement's falsity" and that "[i]f no such proof is offered, the defendant is entitled to prevail." (Pet. App. 42-46) Third, pointing out that "[t]he importance of summary adjudication in the context of libel litigation cannot be overemphasized" because of the chilling effect of such expensive suits on the exercise of First Amendment rights, the necessity to apply the ordinary rules governing summary judgment. (Pet. App. 46-47)

Employing these principles, the Appellate Division held the statements contained in the McGreal letter to be either constitutionally protected opinion or factual statements which Immuno A.G. had failed to show susceptible of being proven false and, indeed, that the record showed in most instances to be "demonstrably true."

With respect what Immuno A.G. claims to be "the factual premise for the core libel"—that "there is no way to determine that an animal is definitely not a carrier of the disease" (Pet. Br. 9)[2]—the Appellate Division stated:

> *It is quite clear that Dr. McGreal was correct in her observation that there is no way of definitely determining whether an animal is a non-A/non-B carrier. Dr. Alfred Prince, the discoverer of non-A/non-B hepatitis and widely regarded as the preeminent authority on that form of hepatitis, testified at his deposition that the carrier state in chimpanzees who have been infected with non-A/non-B hepatitis is quite common.* Dr. Prince stated that minimally 25 to 50% and possibly as high as 75 or

[2] Citations to petitioner's brief will have the abbreviation "Pet. Br."

even 100% of animals remain non-A/non-B carriers indefinitely after they are no longer actively diseased. *Dr. Prince expressly confirmed that, as Dr. McGreal had stated, there is no test to identify the viral agent which causes non-A/non-B hepatitis, and indeed Immuno's own Dr. Eder co-authored an article acknowledging that the virus lacks generally accepted serological and morphological markers* (4 Hematology Magazine 510 [1984]). *There is then no real issue as to the accuracy of the factual premise underlying McGreal's concern that undetected non-A/non-B carriers might be released.* Immuno urges, however, that although there is no test for the non-A/non-B virus, it is possible to prevent the release of infectious chimpanzees, thus removing any risk of the spread of non-A/non-B hepatitis. But, here again, Immuno's plan would seem to have been completely unrealistic, for *the test Immuno claims it would have performed to determine whether its former research subjects were still infectious was to inoculate a healthy animal with the blood of a research veteran and see whether the healthy chimp developed hepatitis symptoms. Dr. Prince termed this procedure "expensive," "laborious" and "wasteful," and observed that it would involve the infection of healthy chimpanzees. He noted that the procedure's many drawbacks made its use rare.* Under these circumstances, McGreal can hardly be faulted for not assuming that Immuno would necessarily perform the inoculation procedure on every one of the many chimps it intended to return to the wild. *Without any practical means of screening for non-A/non-B carriers, there was certainly some risk reasonably to be perceived in a rehabilitation scheme such as that proposed by Immuno.*

(Pet. App. 63-64; emphasis added.)

The New York Court of Appeals unanimously affirmed, holding that the publications at issue were opinion protected by the federal and state constitutions and thus not properly the sub-

ject of a libel suit and that the Appellate Division had applied the appropriate summary judgment standard. (Pet. App. 1-13)

With respect to the statements in the letter of a factual nature, the Court of Appeals observed that "the Appellate Division examined each statement meticulously, and concluded from the voluminous record not only that plaintiff had failed to adduce evidence of falsity but also that all such factual assertions were demonstrably true." (Pet. App. 4)

The Court of Appeals went on to consider, as a part of its analysis of whether the challenged statements were fact or opinion, "the context of the challenged remarks." (Pet. App. 7) In that regard, the court considered the fact that the statements at issue were contained in a letter to the editor. (Pet. App. 7-10)

Immuno A.G.'s motion to reargue was denied. (Pet. App. 72)

SUMMARY OF ARGUMENT

Immuno A.G.'s petition for certiorari should be denied. There is no conceivable reason for this Court, in a case of "pure opinion" based on stated facts, to review a factual determination made by the New York appellate courts in applying the state court summary judgment rule.

1. While replete with numerous misstatements of law and fact, *see* Rule 15.1, Rules of Supreme Court, and cloaked in a fallacious argument that a question of law involving "mixed opinion" is somehow presented here, Immuno A.G. asks this Court to do no more than review a factual determination of the New York Appellate Division which was adopted by the Court of Appeals. Such a review is not appropriate.

2. The New York appellate courts applied the ordinary rules of summary judgment as previously formulated under applicable New York statutes and decisions.

3. The New York appellate courts did not hold, as Immuno A.G. claims, that letters to the editor occupy a "defamation-free

zone." Rather, the courts below, in determining whether the complained of statements were facts or opinion, appropriately considered that the communication appeared in a letter to the editor.

4. The New York Court of Appeals independently relied upon the State Constitution as a ground for decision.

ARGUMENT: REASONS FOR DENYING CERTIORARI

I. Certiorari Is Not Warranted Because, While Arguing That There Is A Legal Issue Of "Mixed Opinion," Immuno A.G. Actually Asks This Court To Review The Findings Of Fact Of The Lower Courts.

A. Immuno A.G.'s Argument Fails To Defer Appropriately To The State Appellate Court Correct Review Of The Record.

Immuno A.G.'s whole argument on "mixed opinion," which itself is misconceived, *see* point B *infra*, rests upon the request that this Court overturn a factual determination of the New York appellate courts. That argument is contrary to law and the record.

Immuno A.G. is requesting that this Court independently review the record in a situation where deference to the factual determination of the New York appellate courts is legally appropriate, especially in view of the Appellate Division's meticulous review of the record.

Moreover, in urging this Court to revisit the record, Immuno A.G. distorts the letter and the record and, as pointed out above (pp. 2-3), ignores the reasoned analysis of the New York Appellate Division of the only statement in the letter about which Immuno A.G. complains—"that there is no way to determine that an animal is definitely not a carrier of the disease." (Pet. App. 63–64) In sum, the Appellate Division held that the statement that there was no way to determine definitely an animal was not a carrier of the disease was literally true because, as Dr. Prince (the discov-

erer of hepatitis non-A/non-B) had testified and as Immuno A.G.'s own Dr. Eder had written, there was no test to identify the hepatitis non-A/non-B viral agent; and the judgment in omitting reference to an expensive, impractical, wasteful and rarely used inoculation procedure to determine infectiousness could not be faulted.

B. Immuno A.G. Misapplies The "Mixed Opinion" Doctrine.

Immuno A.G.'s argument on "mixed opinion" is based on an erroneous legal premise. "Mixed opinion" occurs when the communication implies undisclosed defamatory facts which support the stated opinion, not, as here, where the facts on which the opinion was based were disclosed. This is a classic case of pure opinion. *Steinhilber* v. *Alphonse*, 68 N.Y.2d 283, 289-90, 501 N.E.2d, 550, 552-53, 508 N.Y.S.2d, 901, 903-09 (1986).[3] Indeed, this point was so clear that the Court of Appeals did not need to address it in this case.[4]

II. There Is No Need For This Court To Review The Application Of The New York Summary Judgment Rule.

Immuno A.G. also argues that the New York Court of Appeals has set libel plaintiffs an unconstitutional and impossible

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[3] Notably, *none* of the cases cited by Immuno A.G. for the "mixed opinion" category apply that doctrine. Most of the cases cited hold that what was involved was "pure opinion" and *not* "mixed opinion". *See Dunn* v. *Gannett New York Newsmagazine, Inc.*, 833 F.2d 446 (3d Cir. 1984); *Redco Corp.* v. *CBS, Inc.*, 758 F.2d 970 (3d Cir.); *cert denied*, 474 U.S. 843 (1985); *Goodrich* v. *Waterbury Republican-American*, 188 Conn. 107, 448 A.2d 1317 (1982). The other cases cited, *Cianci* v. *New Times Pub. Co.*, 639 F.2d 54 (2d Cir. 1980), and *Silsdorf* v. *Levine*, 59 N.Y.2d 8, 449 N.E.2d 716, 462 N.Y.S.2d 822, *cert. denied*, 464 U.S. 831 (1983), rely *not* on the "mixed opinion" category, but on the holding that accusations of criminal conduct are not constitutionally protected opinion.

[4] Immuno A.G. relies on its mistaken notion of the "mixed opinion" doctrine to argue that the Court should take this case as a companion to *Milkovich* v. *The Lorain Journal Co.*, ___ U.S. ___, 110 S. Ct. 863 (Jan. 22, 1990) No. 89-645. Since there is no "mixed opinion" issue, there is no reason for the Court to review this case in connection with its review of *Milkovich*.

high standard for proving falsity before trial. While admitting that it has the burden of proving falsity, Immuno A.G. argues that the issue of falsity is one for trial and not summary judgment and that the New York appellate courts erroneously applied special procedural protections by granting summary judgment out of undue solicitude for the First Amendment. This argument misstates what the New York appellate courts did and is nothing more than a contrived complaint about appropriate pretrial adjudication under the New York summary judgment statute, CPLR 3212, consistent with the right to free speech and a free press under the United States and New York Constitutions.

The New York appellate courts did not sanction special procedural protections in libel cases, but rather noted that courts must not be reluctant to apply the ordinary rules of summary judgment in libel cases because of the "chilling effect" of such suits on the exercise of First Amendment rights. (Pet. App. 47, 12)

The courts below simply applied the ordinary but important standard for summary judgment in New York: that a party in opposing a properly made notion for summary judgment under CPLR 3212 cannot rest on the conclusory allegations of the complaint, but must come forward with competent evidence to demonstrate that triable issues exist. *See Zuckerman* v. *City of New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1980); *Alvord & Swift* v. *Steward M. Muller Constr. Co.*, 46 N.Y.2d 276, 281-82, 413 N.Y.S.2d 309, 311-312 (1978); *Freedman* v. *Chemical Constr. Corp.*, 43 N.Y.2d 260, 401 N.Y.S.2d 176 (1977); *Mallad Constr. Corp.* v. *County Fed. Sav. & Loan Ass'n*, 32 N.Y.2d 285, 344 N.Y.S.2d 925 (1973). Because Immuno A.G. had failed in meeting its burden of coming forward with proof in an evidentiary form sufficient to create a triable issue of falsity, Dr. Moor-Jankowski was entitled to summary judgment. There is no reason for this Court to review that finding.

III. The New York Court Of Appeals Appropriately Considered The Fact That The Communication At Issue Was A Letter To The Editor As Part Of Its Analysis Of The Context of The Communication.

Immuno A.G. also seeks this Court's review on the ground that "as a practical matter," the Court of Appeals ruled that a letter to the editor occupies a "defamation free zone" and cannot be the subject of a libel action. (Pet. App. 14)

The Court of Appeals did not hold that letters to the editor may never be the subject of libel suits. What the Court of Appeals (and the Appellate Division) did was appropriate: to articulate that courts, in determining whether to classify an expression as one of fact or opinion, should consider the context in which the statement is made and, in that regard, should take into account that letters to the editor are viewed as communicating the opinions of the author and provide an important vehicle for the expression of opinion by readers of the publication. Surely, it was unexceptional for the Court of Appeals to consider the publishing context of letters to the editor as an important factor in its analysis. *See, e.g., Karnell* v. *Campbell*, 206 N.J. Super. 81, 501 A.2d 1029 (N.J. Super. A.D. 1985) (suit over letter to the editor criticizing developer dismissed as opinion).

IV. An Independent State Ground of Decision Exists.

The Court of Appeals based its decision on the New York Constitution[5] as well as the Federal Constitution. (Pet. App. 5, 11) And, as the Court of Appeals has held, the citation to the New York Constitution by the Court of Appeals must be read as establishing an independent state ground. *See People* v. *Class*, 63 N.Y.2d 791 (1984), *rev'd*, 475 U.S. 106 (1986), *on remand*, 67 N.Y.2d 431 (1986), (after Supreme Court reversal on federal con-

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[5] Indeed, the New York Court of Appeals has held that the free speech and press guaranty in the New York Constitution provides greater protection than the First Amendment to the Federal Constitution. *O'Neill* v. *Oakgrove Construction, Inc.*, 71 N.Y.2d 521, 523 N.E.2d 277, 528 N.Y.S.2d 1 (1988).

stitutional grounds, the Court of Appeals on remand adhered to its original decision as a matter of state constitutional law, stating it would take a compelling or extraordinary showing to change the original state constitutional decision).

CONCLUSION

Respondent Dr. Jan Moor-Jankowski respectfully requests that this Court deny Immuno A.G.'s petition for a writ of certiorari.

Dated: New York, New York
June 8, 1990

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APPENDIX

RESPONDENT'S APPENDIX-1

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deprive any person of life, liberty or property, without due process of law.

Article I, Section 28 of the New York State Constitution provides in pertinent part:

> Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press . . . .

Section 3212 of the New York Civil Practice Law and Rules ("CPLR") provides in pertinent part:

> A motion for summary judgment . . . shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party.